State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 25, 2021 528882

In the Matter of ANTONIO MM.,
Petitioner,
v MEMORANDUM AND ORDER

TARA NN.,
Appellant.

Calendar Date: January 7, 2021

Before: Garry, P.J., Egan Jr., Lynch, Clark and Reynolds Fitzgerald, JJ.

Rural Law Center of New York, Castleton (Kristin A. Bluvas of counsel), for appellant.

Jessica H. Vinson, Glens Falls, attorney for the child.

Egan Jr., J.

Appeal from an order of the Family Court of Warren County (Kershko, J.), entered March 25, 2019, which partially granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of a child (born in 2013). Pursuant to a June 2018 custody order, Family Court granted the parents joint legal and shared physical custody of

the child, with parenting time to alternate on a weekly basis.[1] In January 2019, the father commenced this custody modification proceeding, seeking sole legal and primary physical custody of the child, with parenting time for the mother one week per month, alleging that, since entry of the prior order, the mother has relocated to Florida and has been unable to exercise her parenting time in conformity with the terms thereof. Following a fact-finding hearing, Family Court denied the mother's motion to dismiss the petition, determining that the father had demonstrated a change in circumstances since entry of the prior custody order, and granted the father's petition to the extent that it continued the award of joint legal custody of the child, but awarded him primary physical custody, with parenting time to the mother on specific dates each month. The mother appeals, and we affirm.

A party seeking a modification of a prior order of custody must demonstrate that there has been a change in circumstances since entry of the prior order to warrant an analysis as to whether modification thereof would serve the best interests of the children (see Matter of Matthew DD. v Amanda EE., 187 AD3d 1382, 1382 [2020]). Contrary to the mother's assertion, there was a clear change in circumstances since entry of the prior order as the mother relocated to Florida at the end of June 2018 and was thereafter unable to adhere to the court-ordered alternating week parenting schedule for any month between June 2018 and the father's filing of the subject petition in January 2019. Although the mother claims that Family Court was aware, prior to entry of its June 2018 custody order, that she would be relocating to Florida, as it had denied her petition to relocate with the child, Family Court's denial in this regard did not lead to the inevitable conclusion that the mother would, regardless of the court's determination, ultimately proceed with

[1] Although the mother appealed from Family Court's June 2018 order, Family Court subsequently issued the subject March 2019 order and, consequently, this Court dismissed, as moot, the mother's appeal from the June 2018 order (Matter of Antonio MM. v Tara NN., 182 AD3d 716, 717 [2020]).

her relocation to Florida without the child.[2] However, in light of the mother's subsequent decision to follow through with her relocation and the lack of adequate notice that she thereafter provided to the father as to when she would be traveling to New York to exercise her parenting time, the prior custody order proved unworkable and, as such, we find that Family Court appropriately denied the mother's motion to dismiss as a change in circumstances had occurred since entry of the prior order (see Matter of LaBaff v Dennis, 160 AD3d 1096, 1096-1097 [2018]; Matter of Imrie v Lyon, 158 AD3d 1018, 1019 [2018]).

Turning to the best interests analysis, we find that there is a sound and substantial basis in the record supporting Family Court's award of primary physical custody to the father, with a specifically tailored monthly parenting schedule for the mother. The parties do not dispute that each parent has a loving relationship with the child, has provided an adequate home environment and is able to capably provide for the child's physical, financial, emotional and intellectual well-being. Since entry of the prior custody order, however, the child has primarily resided with the father subject only to the mother's unilateral decision-making as to when the exercise of her parenting time would conveniently fit into her travel schedule. The father testified that the resulting ad hoc custody arrangement not only failed to conform to Family Court's prior order, but also failed to provide stability for the child during the school year, as the uncertainty and inconsistency as to when the mother would be available to exercise her parenting time made it nearly impossible for him to make plans with respect to the child. The mother agreed, moreover, that she is unable to

[2] In fact, at the February 2019 fact-finding hearing, the mother attempted to convince the Family Court that she had not, in fact, relocated to Florida and that she continued to reside at the maternal grandmother's house in the City of Glens Falls, Warren County. This assertion, however, was directly controverted by, among other things, the mother's text messages to the father and the fact that she had obtained a Florida driver's license, registered a car in Florida and made the necessary changes to receive her Social Security benefits in Florida.

abide by the alternating week on/week off parenting schedule and indicated that she would prefer to be allotted 10 to 15 days of parenting time each month with the child – a schedule that Family Court largely accommodated in the parenting time schedule set forth in its order. Family Court also made adjustments to the parenting time schedule in order to provide the mother a more convenient time to communicate with the child via telephone and/or Facetime and provided specific guidelines for the parties to follow with respect to scheduling medical and dental appointments so that each of them would receive notification of all such appointments and be able to participate either in person or via electronic means as they so choose. Accordingly, based on the foregoing, we find that a sound and substantial basis exists to support Family Court's order, and we decline to disturb it (see Matter of Jennifer VV. v Lawrence WW., 186 AD3d 946, 948 [2020]; Matter of Turner v Turner, 166 AD3d 1339, 1339-1340 [2018]; Matter of LaBaff v Dennis, 160 AD3d at 1097).

Garry, P.J., Lynch, Clark and Reynolds Fitzgerald, JJ., concur.

ORDERED that the order is affirmed, without costs.

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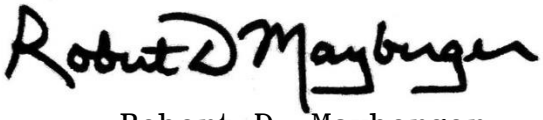

Robert D. Mayberger
Clerk of the Court